IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID L. TAYLOR, JR., Defendant.	No. CR97-0001-LRR C00-0028-LRR ORDER ***NOT FOR PUBLICATION***

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I. INTRODUCTION

This matter comes before the court on the defendant's motion to vacate, set aside or correct his sentence (Docket No. 195). The motion was filed pursuant to 28 U.S.C. § 2255.[1] Also before the court are the defendant's "request [for] leave to amend [his] motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255" (Docket No. 200), "objection to magistrate order denying [defendant's] request for discovery materials" (Docket No. 211), "motion requesting permission to supplement/amend application [pursuant to] 28 U.S.C. § 2255" (Docket No. 215), "motion for leave to file amendment to motion under Title 28 U.S.C. § 2255" (Docket No. 217), and motion for an evidentiary hearing (Docket No. 222). For the following reasons, the defendant's motion pursuant to 28 U.S.C. § 2255, "request [for] leave to amend [his] motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255" ("first motion to amend"), "objection to magistrate order denying [defendant's] request for discovery materials", "motion requesting permission to supplement/amend application [pursuant to] 28 U.S.C. § 2255" ("second motion to amend"),"motion for leave to file amendment to motion under Title 28 U.S.C. § 2255" ("third motion to amend") and motion for an evidentiary hearing shall be denied.[2]

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[1] If a prisoner is in custody pursuant to a sentence imposed by a federal court and such prisoner claims "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, [the prisoner] may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. *See also Daniels v. United States*, 532 U.S. 374, 377, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001).

[2] No response from the government is required because the motion and file make

(continued...)

II. BACKGROUND

On January 22, 1997, the government filed a three-count indictment against the defendant. On February 21, 1997, the court appointed David Nadler to represent the defendant.[3] On March 21, 1997, the defendant filed a motion to suppress evidence. On March 24, 1997, the government filed a resistance to the defendant's motion to suppress evidence. On April 16, 1997, the court allowed David Nadler to withdraw as counsel and appointed Brad Driscoll to represent the defendant.[4] On May 23, 1997, the court held a hearing regarding the defendant's oral request to appoint substitute counsel. On May 27, 1997, the court denied such request. On May 28, 1997, the defendant filed an application to dismiss counsel. On June 2, 1997, the court denied the defendant's motion to suppress evidence. On June 4, 1997, the court denied the defendant's application to dismiss counsel. On June 26, 1997, the defendant filed another application to dismiss counsel. On July 3, 1997, the court held a hearing regarding the defendant's June 26, 1997 application to dismiss counsel. On the same day, the court denied the defendant's application to dismiss counsel. Although a jury trial was scheduled for July 8, 1997, the defendant failed to appear for such trial.

On August 6, 1997, the government filed a four-count superseding indictment against the defendant. Count one of the superseding indictment charged the defendant with

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(...continued)
clear the defendant is not entitled to relief. *See* 28 U.S.C. § 2255; Rule 4(b), Rules Governing Section 2255 Proceedings.

[3] David Nadler represented the defendant from February 21, 1997 to April 16, 1997. The court permitted David Nadler to withdraw as counsel because a conflict of interest developed.

[4] Brad Driscoll represented the defendant from April 21, 1997 to December 3, 1997.

conspiracy to distribute and possess with intent to distribute 50 grams or more of crack cocaine.[5] Count two of the superseding indictment charged the defendant with possession with intent to distribute approximately 31.08 grams of crack cocaine.[6] Count three of the superseding indictment charged the defendant with failure to appear as required.[7] And, count four of the superseding indictment sought the forfeiture of $1,489.00 which had been seized.[8] On September 30, 1997, the defendant's jury trial commenced. On October 1, 1997, the jury found the defendant guilty of count one, count two and count four of the superseding indictment.[9]

On October 7, 1997, the defendant filed an "application to proceed pro se with standby counsel." On October 23, 1997, the defendant, proceeding pro se, filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. In such motion, the defendant asserted: 1) the court abused its discretion when it allowed a gun to be admitted into evidence and when it selected the jury; 2) the prosecutor engaged in misconduct when introducing the gun, offering prejudicial remarks about such gun and allowing Lacy Snead

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[5] The conduct charged in count one of the superseding indictment is in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 846.

[6] The conduct charged in count two of the superseding indictment is in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B).

[7] The conduct charged in count three of the superseding indictment is in violation of 18 U.S.C. § 3146(a)(1).

[8] The conduct charged in count four of the superseding indictment is in violation of 18 U.S.C. § 853.

[9] Prior to trial, the court severed the failure to appear count, or count three, from the drug counts, or count one and count two. Before the defendant's sentencing, the court dismissed without prejudice the failure to appear count.

to testify falsely; and 3) trial counsel provided ineffective assistance. With respect to his ineffective assistance of counsel claim, the defendant argued counsel did not provide effective assistance because he failed to: a) object to a jury pool that had no minorities; b) file a pre-trial motion challenging the admissibility of highly prejudicial evidence; c) provide or discuss Grand Jury testimony of government witness Lacy Snead which would have shown he presented false testimony; d) question or interview a key defense witness until the day of trial; and e) meet with him more than three or four times before trial commenced.

On December 1, 1997, the court held a hearing regarding the defendant's October 7, 1997 "application to proceed pro se with standby counsel." Although frequently cautioned by the court, the defendant insisted on representing himself through his post-trial proceedings. On December 3, 1997, the court granted the defendant's "application to proceed pro se with standby counsel" and appointed a different attorney to serve as standby counsel because of the ineffective assistance of counsel claims raised by the defendant in his motion for a new trial. Charles Nadler replaced Brad Driscoll and served only as standby counsel.[10]

On October 27, 1997, the government resisted the defendant's motion for a new trial. On November 14, 1997, the defendant filed a memorandum in support of his motion for a new trial. On December 1, 1997, the defendant filed a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). In such motion, the defendant claimed the prosecutor engaged in misconduct and the court abused its discretion. On December 11, 1997, the government filed a memorandum in support of its

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[10] Charles Nadler continued to serve as standby counsel throughout the post-trial proceedings. On appeal, it appears Charles Nadler either represented the defendant or continued to function only as standby counsel.

October 27, 1997 resistance. On December 30, 1997, the defendant filed an amendment to his memorandum in support of his motion for a new trial and brief in support of his motion for judgment of acquittal.

On April 3, 1998, the court held an evidentiary hearing on the defendant's motion for a new trial. On May 13, 1998, the court heard oral arguments regarding the defendant's motion for a new trial. On May 27, 1998, the defendant filed a motion to dismiss his standby counsel. On June 10, 1998, the defendant filed a motion to renew and amend his motion for judgment of acquittal based on evidence pertaining to Doug Larson's testimony. On June 26, 1998, the court encouraged the defendant to give serious consideration as to whether he wanted to proceed pro se and denied the defendant's motion to dismiss his standby counsel. On July 13, 1998, the court held another evidentiary hearing on the defendant's motion for a new trial. On the following day, the court reviewed all of the defendant's claims, including his ineffective assistance of counsel claim, and denied the defendant's motion for a new trial and motion for judgment of acquittal. Before denying those motions, the court briefly outlined the testimony that was presented at trial:

> The evidence in this case shows that a search warrant was executed on March 20, 1996, at 2129 North Towne Lane N.E., Apt. 10, Cedar Rapids, Iowa. During the execution of the search warrant, the defendant was found in a bedroom in which more than 31 grams of crack cocaine was discovered under a mattress. Additionally, several guns were seized from the bedroom. Officer Doug Larison testified at trial that he interviewed the defendant at the scene. According to Officer Larison, the defendant admitted that he was holding the crack cocaine for Raymond Washington. [The defendant] also admitted that he was a heavy user of crack cocaine.

> In addition to [the] discovery of the drugs and [the defendant's] confession, there was other evidence that implicated [the defendant] in drug dealing. Several cooperating witnesses testified against [the defendant]. Tally Morales testified that she had personally purchased crack cocaine on a number of occasions from the defendant. Lacy Snead was also a government witness who testified that he was the defendant's drug supplier. Mr. Snead's testimony was particularly incriminating because he also was able to identify a sheet of paper which had been seized from him by police officers. The paper was shown to be Snead's drug ledger. The defendant's nickname "B.C." (which stands for Bone Crusher) appears on that ledger as owing Mr. Snead $2,000. This ledger obviously corroborates Lacy Snead's testimony about his sales to the defendant. In addition, Lacy Snead's brother, Glendale Snead, also testified that he assisted his brother in his drug dealing and on occasion had delivered drugs to "B.C."
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> In summary, the government had an extremely strong case. They had the testimony of three cooperating witnesses, a drug ledger with the defendant's nickname on it, the seizure of over an ounce of crack cocaine in a bedroom in which there was strong evidence the defendant was living, and the defendant's own admission that he was holding the crack cocaine for another individual.

On August 11, 1998, the court conducted a sentencing hearing. At such hearing, the court sentenced the defendant to 324 months imprisonment and 4 years supervised

release.[11] On the following day, the court entered judgment against the defendant. On August 14, 1998, the defendant filed a timely appeal.

On April 14, 1999, the Eighth Circuit Court of Appeals affirmed the defendant's conviction and resulting sentence. *See United States v. Taylor*, 175 F.3d 1026, 1999 U.S. App. LEXIS 7203, 1999 WL 220103 (8th Cir. 1999). On appeal, the Eighth Circuit Court of Appeals considered:

> [whether] the trial court erred in denying [the defendant's] motion for a new trial, [whether] the government violated [the defendant's] due process rights by withholding exculpatory material, and [whether] the trial court erred in denying [the defendant's] motion to dismiss his counsel before trial.

Id. With respect to the defendant's first argument, the Eighth Circuit Court of Appeals stated:

> [the defendant's] motion for a new trial was unusual in that it was made on the ground that he had been denied the right to the effective assistance of counsel secured by the Sixth Amendment to the Constitution. Ordinarily, such motions are made post-appeal under 28 U.S.C. § 2255; but in this instance the trial court held more than one hearing on the motion in the belief, correct we think, that this kind of claim may be heard and determined in the context of a post-trial motion for a new trial. *See United States v. Smith*, 62 F.3d 641, 650-51 (4th Cir. 1995). After a full consideration of the matter, the trial

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[11] Relying on the United States Sentencing Guidelines, the court imposed a 324-month term on count one and a 324-month term on count two. Both terms were ordered to run concurrently. The court sentenced the defendant based on a total offense level of 38 and a criminal history category of IV. Before reaching the total offense level of 38, the court determined: 1) the base offense level should be 34 pursuant to U.S.S.G. § 2D1.1; 2) two levels should be added pursuant to U.S.S.G. § 2D1.1(b)(1); and 3) two levels should be added pursuant to U.S.S.G. § 3C1.1. Utilizing U.S.S.G. § 4A1.1, the court determined the defendant's criminal history to be IV.

> court denied the motion, ruling that [the defendant's] counsel did in fact provide him with effective representation. The trial court's thorough opinion and careful scrutiny of the record make it unnecessary for us to visit this issue in any detail. We are satisfied after our own examination of the record that there is no error of law or fact in the trial court's conclusion that the ineffective assistance claim ought to be denied.

Id. Concerning the defendant's second argument, the Eighth Circuit Court of Appeals stated:

> *Brady v. Maryland*, 373 U.S. 83, 87 (1963), requires the government to provide a defendant with any exculpatory material that it may have in its possession so that the defendant may make use of it at trial. [The defendant] maintains that the government failed to provide him with details about the manner in which one of the witnesses against him had cooperated with the government in drug investigations in the past. But [the defendant] did know that the witness had cooperated, and effective use of that fact was made on cross-examination. Such details as [the defendant] subsequently learned about that cooperation would not, we are satisfied, have had an effect on the jury's verdict, in light of the extensive cross-examination of the relevant witness that did occur and the weight of the other evidence against [the defendant].

Id.[12] And, with regard to the defendant's third argument, the Eighth Circuit Court of Appeals stated: "our reading of the record convinces us that the trial court committed no error in denying [the defendant's] motion to dismiss counsel before trial." *Id.*

On March 1, 2000, the defendant filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. In the 28 U.S.C. § 2255 motion, the defendant challenges his conviction and resulting sentence on several grounds. Specifically, the defendant contends:

> 1. Trial counsel's failure to investigate or question Tally [Morales] or the Sneads about her entry on the Sneads alleged drug ledger, and Tally [Morales'] relationship with the Sneads outside of the controlled drug buy transactions constitutes performance falling outside the wide range of reasonable professional assistance and unfairly prejudiced [him]. This issue combined with the newly discovered evidence [causes to] exist a reasonable possibility the outcome of [his] trial would have been different.
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> 2. [His] Sixth Amendment right to effective assistance of counsel was abridged [because] previous counsel (David Nadler) failed to amend the motion to suppress evidence [and,] without the evidence, there was a likelihood that [he] would have been acquitted.
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> 3. [The prosecutor] and the DEA agents misconduct deprived [him] of Brady exculpatory evidence in violation of [his] Fifth Amendment due process [right].

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[12] Although it is not clear from the Eighth Circuit Court of Appeals's discussion of the *Brady* claim, it is clear from the pleadings filed in support of the motion for a new trial based on newly discovered evidence that the Eighth Circuit Court of Appeals, before rejecting his *Brady* claim, addressed the defendant's concerns about Tally Morales' testimony in light of a "non-disclosed document" that showed all of the controlled buys between Tally Morales and the Sneads.

With respect to his first claim and second claim, the defendant relies on *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Concerning his third claim, the defendant relies on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

On August 25, 2000, the defendant filed his first motion to amend. In such motion, the defendant argues:

> The government did not treat the drug type or quantity as elements of the conspiracy, in violation of [his] Fifth Amendment right to due process and Sixth Amendment right to a jury trial.

To support his argument, the defendant relies on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

On June 25, 2001, the defendant filed a "discovery request" pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings. On June 26, 2001, the government filed a resistance. On July 9, 2001, Chief Magistrate Judge John A. Jarvey denied the defendant's discovery request. On the same day, the defendant filed a reply. On July 16, 2001, the defendant filed an objection to Chief Magistrate Judge John A. Jarvey's order denying his discovery request. On July 24, 2001, the government, in light of the defendant's objection, filed an amended response to the defendant's June 25, 2001 discovery request. On August 8, 2001, the defendant filed a reply.

On April 5, 2002, the defendant filed his second motion to amend. On May 20, 2002, the defendant filed a supplement or amendment. In such pleading, the defendant argues:

> [H]is Sixth Amendment Constitutional Rights were violated when counsel of record failed to object and argue [as] to the admission of a laboratory report which was utilized [for purposes of proving] the alleged substance, [an] essential

> element of the offense. [Such] report was inadequate [and] [prejudiced his defense].

To support his argument, the defendant relies on *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

On August 23, 2004, the defendant filed his third motion to amend. In such motion, the defendant argues:

> Trial counsel's failure to investigate/question Tally [Morales] and the Sneads about her entry on the Snead's alleged drug ledger and the relationship between them outside of the controlled buy transactions, resulted in the credibility of those witnesses not being substantially destroyed and in enhancing factors no reasonable jurist would have found.

Stated differently, the defendant believes that, if trial counsel had fully developed the record, the testimony of Tally Morales and the Sneads would have been substantially destroyed and his sentence would not have been enhanced on the basis of their testimony. The defendant also argues his sentence is in violation of *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

On March 9, 2005, the defendant filed a motion for an evidentiary hearing on his 28 U.S.C. § 2255 claims.

The court now turns to consider the defendant's motion pursuant to 28 U.S.C. § 2255, first motion to amend, objection, second motion to amend, third motion to amend and motion for an evidentiary hearing.

III. LEGAL ANALYSIS

A. Standards Applicable to Motion Pursuant to 28 U.S.C. § 2255

28 U.S.C. § 2255 allows a prisoner in custody under sentence of a federal court to move the sentencing court to vacate, set aside or correct a sentence. To obtain relief pursuant to 28 U.S.C. § 2255, a federal prisoner must establish: (1) the sentence was

imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) his sentence is otherwise subject to collateral attack. *See Hill v. United States*, 368 U.S. 424, 426-27, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962) (citing 28 U.S.C. § 2255).

Although it appears to be broad, 28 U.S.C. § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979). Rather, 28 U.S.C. § 2255 is intended to redress only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428. *See also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.") (citing *Poor Thunder*, 810 F.2d 810, 821 (8th Cir. 1987)). A collateral challenge under 28 U.S.C. § 2255 is not interchangeable or substitutable for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) (making clear a motion pursuant to 28 U.S.C. § 2255 will not be allowed to do service for an appeal). Consequently, "[a]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (internal quotation marks and citation omitted).

In addition, defendants ordinarily are precluded from asserting claims they failed to raise on direct appeal. *See McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001). "A defendant who has procedurally defaulted a claim by failing to raise it on direct review may raise the claim in a [28 U.S.C. §] 2255 proceeding only by demonstrating

cause for the default and prejudice or actual innocence." *Id.* (citing *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)). *See also Massaro v. United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003) ("The general rule [is] that claims not raised on direct appeal may not be raised on collateral review unless the [defendant] shows cause and prejudice."). "'[C]ause' under the cause and prejudice test must be something *external* to the [defendant], something that cannot be fairly attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (emphasis in original). If a defendant fails to show cause, a court need not consider whether actual prejudice exists. *McCleskey v. Zant*, 499 U.S. 467, 501, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). Actual innocence under the actual innocence test "means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623-24. *See also McNeal*, 249 F.3d at 749 ("[A] defendant must show factual innocence, not simply legal insufficiency of evidence to support a conviction.").[13]

B. Review of the Defendant's Motion for an Evidentiary Hearing and Objection

With respect to his motion for an evidentiary hearing, a district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255. *See United States v. Oldham*, 787 F.2d 454, 457 (8th Cir. 1986). In exercising that discretion, the district court must determine whether the facts alleged, if true, would entitle the movant to relief. *See Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996). "Accordingly, [a district court may summarily dismiss a motion brought under

[13] The procedural default rule applies to a conviction obtained through trial or through the entry of a guilty plea. *See United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1997); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997); *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997); *Reid v. United States*, 976 F.2d 446, 448 (8th Cir. 1992).

28 U.S.C. § 2255 without an evidentiary hearing] if (1) the . . . allegations, accepted as true, would not entitle the [movant] to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Engelen v. United States*, 68 F.3d 238, 240-41 (8th Cir. 1995) (citations omitted). Stated differently, a 28 U.S.C. § 2255 motion can be dismissed without a hearing where "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. *See also Standing Bear v. United States*, 68 F.3d 271, 272 (8th Cir. 1995) (per curiam).

The court's review of the record leads it to conclude it is able to resolve the defendant's claims from the record. Thus, there is no need for an evidentiary hearing. *See Rogers v. United States*, 1 F.3d 697, 699 (8th Cir. 1993) (holding "[a]ll of the information that the court needed to make its decision with regard to [the petitioner's] claims was included in the record . . . ." and therefore the court "was not required to hold an evidentiary hearing") (citing Rule Governing Section 2255 Proceedings 8(a) and *United States v. Raddatz*, 447 U.S. 667, 674, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980)). The evidence of record conclusively demonstrates that the defendant is not entitled to the relief sought. Specifically, the record indicates the defendant's claims are procedurally barred or wholly without merit. As such, the court finds that there is no need for an evidentiary hearing, and the defendant's motion shall be denied.

Concerning the July 16, 2001 objection, the court agrees with the result, that is, Chief Magistrate Judge John A. Jarvey's decision to deny the defendant's "discovery request." The court, however, disagrees with Chief Magistrate Judge John A. Jarvey's reasons for denying such request. Nonetheless, the same result is reached because the court does not believe further discovery is warranted, especially considering the clarity of

the record and the arguments presented. Accordingly, the defendant's objection shall be overruled.

C. Review of the Defendant's Motion Pursuant to 28 U.S.C. § 2255

1. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defense." U.S. Const., Amend. VI. Furthermore, criminal defendants have a constitutional right to effective assistance of counsel in their first appeal. *Evitts v. Lucey*, 469 U.S. 387, 393-95, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Douglas v. California*, 372 U.S. 353, 356-57, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

The Sixth Amendment right to effective counsel is clearly established. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the United States Supreme Court explained that a violation of that right has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. *See also Williams v. Taylor*, 529 U.S. 362, 390, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (reasserting *Strickland* standard). Thus, *Strickland* requires a showing of both deficient performance and prejudice. However, "a court deciding an ineffective assistance claim need not address both components of the inquiry if the defendant makes

an insufficient showing on one." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, . . . that course should be followed." *Id.* *See also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("[A court] need not address the reasonableness of the attorney's behavior if the movant cannot prove prejudice.").

To establish unreasonably deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The "reasonableness of counsel's challenged conduct [must be reviewed] on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. There is a strong presumption of competence and reasonable professional judgment. *Id.* *See also United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001) (operating on the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance") (quoting *Strickland*, 466 U.S. at 689); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) (broad latitude to make strategic and tactical choices regarding the appropriate action to take or refrain from taking is afforded when acting in a representative capacity) (citing *Strickland*, 466 U.S. at 694). In sum, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

To establish prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In other words, "the question is whether there is a reasonable probability that, absent those errors, the fact finder would have had a reasonable doubt respecting guilt."

Id. at 695. In answering that question, the court "must consider the totality of the evidence before the judge or jury." *Id.*

Concerning his claim that trial counsel (Brad Driscoll) failed to investigate or question Tally Morales or the Sneads about the $1,750.00 entry in the drug ledger corresponding to Tally Morales, the court lacks the authority to review the merits of such claim because "[i]t is well settled that claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255." *United States v. Shabazz*, 657 F.2d 189, 190 (8th Cir. 1981) (citing *Anderson v. United States*, 619 F.2d 777, 773 (8th Cir. 1980)). *See also Dall v. United States*, 957 F.2d 571, 572-73 (8th Cir. 1992) (relying on *Shabazz*, 657 F.2d at 190 when it concluded defendant could not raise claims already addressed on direct appeal); *United States v. Kraemer*, 810 F.2d 173, 177 (8th Cir. 1987) (concluding defendant "cannot raise the same issues in a [28 U.S.C. § 2255 motion] that have been decided on direct appeal or in a new trial motion"); *Butler v. United States*, 340 F.2d 63, 64 (8th Cir. 1965) (concluding defendant is not entitled to another review of his question). The Eighth Circuit Court of Appeals already addressed on direct appeal some of the defendant's claims regarding trial counsel's ineffective assistance and essentially addressed the defendant's claim regarding the $1,750.00 entry in the drug ledger when dealing with the defendant's *Brady* claim.

Moreover, this ineffective assistance of counsel claim is procedurally defaulted. Even if his instant challenge is not identical to the one he previously raised, there is no doubt that the defendant could have raised it in his post-trial motions and on direct appeal. The defendant does not show that the failure to previously present this issue was the result of circumstances outside of his control ("cause") and that the errors of which he complains created actual and substantial disadvantage, such that his entire trial was tainted with error of constitutional proportions ("prejudice"). *See McNeal*, 249 F.3d at 749. It is virtually

impossible for the defendant to show cause in this case for the decisions made, since they were all within his control by virtue of his self-representation after trial. His failure to raise any of the issues he could have presented in a post-trial motion falls squarely at his feet. Since there is no inequity that results from requiring a defendant to bear the risk of attorney error that results in a procedural default, *see Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986), there certainly cannot be any unfairness in that same defendant facing the consequences of decisions made during self-representation. *Cf. Massaro*, 538 U.S. at 509 (concluding a defendant who challenges a federal conviction under 28 U.S.C. § 2255 may raise an ineffective assistance of counsel claim even if he could have raised it on direct appeal but did not). In addition, the defendant does not allege that he is actually innocent. Nor could the defendant make such an allegation in light of the overwhelming evidence indicating that he did enter into a criminal conspiracy to distribute and possess crack cocaine. *See McNeal*, 249 F.3d at 749.

Based on the foregoing reasons, the court need not review the merits of the defendant's claim that trial counsel failed to investigate or question Tally Morales or the Sneads about the $1,750.00 entry in the drug ledger corresponding to Tally Morales. Nonetheless, the court deems it appropriate to conduct such review. This particular ineffective assistance of counsel claim must fail for lack of proof to satisfy the two-prong test established in *Strickland*. Brad Driscoll's performance as trial counsel was objectively reasonable. He successfully cross-examined the government's witnesses, sometimes forcing them to make admissions helpful to the defendant. Specifically, with regard to Brad Driscoll's questioning of Tally Morales, the following colloquy occurred:

> . . .
>
> Q: You became involved in controlled buy transactions involving crack cocaine and Lacy Snead; is that correct?

A: Could you ask me in a different way? I'm not sure what you're asking.

Q: You're familiar with Glendale Snead and Lacy Snead of 1016 15th Street Southeast, Cedar Rapids, Iowa; is that correct?

A: I'm not sure of the address, but the two gentlemen, yes.

Q: Do you consider those two individuals to be drug dealers in the community?

A: Yes, sir.

Q: Did you purchase $1,750 in crack cocaine from one of the Sneads?

A: You mean with the federal agents?

Q: Yes.

A: Yes.

Q: So you provided $1,750 cash in exchange for crack cocaine; is that correct?

A: I'm not sure how much it was.

Q: Is it correct that you posed as a drug user, a purchaser of drugs?

A: I posed during this time, you mean?

Q: Yes.

A: No, that isn't what I said it was for. I said I was copping it for somebody. It was large amounts.

Q: Didn't you hand over the money to Lacy Snead?

A: Yes, I did.

Q: Did you receive crack cocaine in exchange for that money?

A: Yes, I did.

> Q: You didn't hand over the crack cocaine, did you? You handed over the money.
>
> A: I gave the money to Lacy, and he gave me the stuff and I gave it to the agent.
>
> Q: So you were the buyer, the user.
>
> A: I was --
>
> Q: Snead was the seller; is that correct?
>
> A: Yes.
>
> . . .

After thoroughly reviewing the entire record, the court once again finds Brad Driscoll's performance at trial met or exceeded a professional standard of reasonableness. With respect to the prejudice prong, whatever the impact of the additional testimony that could have been disclosed at trial regarding the $1,750.00 entry on the Snead's drug ledger, the jury necessarily would have weighed it against the government's strong proof that showed the defendant was a dealer, not just a user. In short, the defendant has neither overcome the strong presumption that the conduct of trial counsel fell within a wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, nor shown that any deficiencies in trial counsel's performance prejudiced his defense, *id.* at 692-94.

Similarly, with respect to his claim that trial counsel (David Nadler) provided ineffective assistance because he failed to amend the motion to suppress evidence, the court is unable to review the merits of such claim because it is procedurally defaulted. The defendant undoubtedly could have raised the instant challenge in his post-trial motions and on direct appeal. The defendant does not show that the failure to previously present this issue was the result of circumstances outside of his control ("cause") and that the errors of which he complains created actual and substantial disadvantage, such that his entire trial

was tainted with error of constitutional proportions ("prejudice"). *See McNeal*, 249 F.3d at 749. It is virtually impossible for the defendant to show cause in this case for the decisions made, since they were all within his control by virtue of his self-representation after trial. His failure to raise any of the issues he could have presented in a post-trial motion falls squarely at his feet. Since there is no inequity that results from requiring a defendant to bear the risk of attorney error that results in a procedural default, *see Murray*, 477 U.S. at 488, there certainly cannot be any unfairness in that same defendant facing the consequences of decisions made during self-representation. *Cf. Massaro*, 538 U.S. at 509 (concluding a defendant who challenges a federal conviction under 28 U.S.C. § 2255 may raise an ineffective assistance of counsel claim even if he could have raised it on direct appeal but did not). In addition, the defendant does not allege that he is actually innocent. Rather, he argues there is a reasonable possibility the outcome of his trial would have been different. This is insufficient. *See McNeal*, 249 F.3d at 749.

Although it need not review the merits of the defendant's claim that trial counsel failed to amend the motion to suppress evidence, the court deems it appropriate to conduct such review. This particular ineffective assistance of counsel claim must fail for lack of proof to satisfy the two-prong test established in *Strickland.* David Nadler's performance as trial counsel was objectively reasonable. David Nadler filed a motion to suppress evidence. None of the information that the defendant suggests should have been included in an amended motion would have altered the court's determination that it was appropriate to deny his motion to suppress evidence. Contrary to the defendant's assertion, probable cause existed, *see Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), and the affidavit did not contain deliberate or reckless misrepresentations, *see Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Given its prior conclusion regarding the defendant's motion to suppress evidence and the "additional

information" the defendant asserts in his 28 U.S.C. § 2255 motion, the court finds David Nadler's failure to submit a futile motion to amend was not ineffective assistance. *Strickland*, 466 U.S. at 689. In addition, the court finds the defendant was not prejudiced in this regard. *Id.* at 692-94. Because the defendant did not prove either prong of the *Strickland* test, this ineffective assistance of counsel claim fails.

2. Brady Violation

The defendant asserts "[the prosecutor] and the DEA agents misconduct deprived [him] of Brady exculpatory evidence in violation of [his] Fifth Amendment due process [right]." To support his claim, the defendant relies on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). When reviewing the defendant's motion for a new trial based on newly discovered evidence, the court indirectly addressed this particular claim. Although he previously acknowledged that the government did not discover until after trial the additional benefits Tally Morales received for her cooperation, the defendant now deems it appropriate to allege the government intentionally and wilfully withheld the information subsequently learned about Tally Morales. In addition, the defendant alleges the government withheld information concerning Tally Morales' relationship with the Sneads. The defendant acknowledges the Eighth Circuit Court of Appeals already addressed this allegation on direct appeal. Because either this court, when reviewing the motion for a new trial based on newly discovered evidence, or the Eighth Circuit Court of Appeals, when reviewing the direct appeal, already addressed both allegations, the defendant is unable to raise them here. *See Kraemer*, 810 F.2d at 177 (concluding defendant "cannot raise the same issues in a [28 U.S.C. § 2255 motion] that have been decided on direct appeal or in a new trial motion").

Moreover, the record does not support the defendant's allegations. The government never suppressed or withheld evidence from the defendant that was favorable and material

to his defense because the government discovered the new evidence in late December of 1998 and early January of 1999 (over two years after his jury trial concluded) and informed the defendant of such discovery on January 11, 1999. Similarly, it cannot be said that the government withheld evidence regarding Tally Morales' relationship with the Sneads. The defendant's assertion to the contrary is inherently incredible and conclusory. Accordingly, no *Brady* violation occurred. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963) (holding the government's failure to disclose evidence that is both favorable to the accused and material to guilt or punishment violates due process).

In sum, the record indicates the defendant's ineffective assistance of counsel claims and *Brady* claim are procedurally barred or wholly without merit. Accordingly, the defendant's motion pursuant to 28 U.S.C. § 2255 shall be denied.

D. Review of the Defendant's Remaining Motions

Under the Antiterrorism and Effective Death Penalty Act of 1996, a 28 U.S.C. § 2255 motion must be filed within one year of the date the conviction becomes final, except in circumstances not present here. *See* 28 U.S.C. § 2255.[14] Although he timely filed his

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[14] A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–
(1) the date on which the judgment of conviction becomes final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to

(continued...)

original motion, the defendant did not file his first motion to amend (August 25, 2000), second motion to amend (April 5, 2002) and third motion to amend (August 23, 2004) before July 13, 2000, which is the last date he could have timely filed an amendment to his 28 U.S.C. § 2255 motion. *See Clay v. United States*, 537 U.S. 522, 527, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003) ("Finality attaches when [the United States Supreme Court] affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). Because the defendant's untimely filings do not sufficiently relate back to his original 28 U.S.C. § 2255 motion, they are barred. *See United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999) (concluding an otherwise untimely amendment to a 28 U.S.C. § 2255 motion does not relate back to a timely filed motion when the original claims are distinctly separate from the claims in the amendment). *See also Mandacina v. United States*, 328 F.3d 995, 999-1000 (8th Cir. 2003) (citing *Craycraft*, 167 F.3d at 457); *Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir. 1999) (discussing *Craycraft*, 167 F.3d at 456-57).

Moreover, the defendant's reliance on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to claim his sentence does not comply with constitutional standards is without merit. In *Apprendi*, the Supreme Court held that, with the exception of prior convictions, any fact that increases the penalty for a crime beyond the maximum statutory penalty must be submitted to a jury and proven beyond a

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(...continued)

> cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

reasonable doubt. *See Apprendi*, 530 U.S. at 490. *Apprendi*, however, does not apply retroactively. *See United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001). *Cf. Dukes v. United States*, 255 F.3d 912, 913 (8th Cir. 2001) (stating *Apprendi* may be applied retroactively in direct appeals even though *Apprendi* may not be raised on collateral review). The defendant's conviction became "final" for the purposes of a 28 U.S.C. § 2255 motion on July 13, 2000, the last day he had to file a certiorari petition. *See Clay*, 537 U.S. at 527 ("Finality attaches when [the United States Supreme Court] affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). The United States Supreme Court decided *Apprendi* in June of 2000. It follows, then, that the defendant's conviction had become final when *Apprendi* was decided. Accordingly, the court finds the benefit of the rule announced in *Apprendi* is unavailable to the defendant.[15]

Similarly, the defendant's reliance on *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), to challenge his conviction and resulting sentence is unavailing. On January 12, 2005, the Supreme Court addressed the impact of *Blakely* on the United States Sentencing Guidelines. *See United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). In *Booker*, the Supreme Court concluded the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

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[15] The court notes that, even if *Apprendi* had been decided after July 13, 2000, the defendant's claim would still fail because he did not make an *Apprendi* challenge on direct appeal. *See Dukes*, 255 F.3d at 913 (stating failure to make *Apprendi* challenge on direct appeal procedurally bars its assertion on collateral review) (citing *Moss*, 252 F.3d at 1001).

Booker, ___ U.S. at ___, 125 S. Ct. at 756, 160 L. Ed. 2d at 650 (applying its decisions in *Apprendi v. New Jersey*, 530 U.S. 466, and *Blakely v. Washington*, 542 U.S. ___, to the Federal Sentencing Guidelines). In addition, the Supreme Court, with respect to the appropriate remedy, instructed courts to apply *Booker* or its "holdings–both the Sixth Amendment holding and [the] remedial interpretation of the Sentencing Act–to all cases on direct review." *Booker*, ___ U.S. at ___, 125 S. Ct. at 769, 160 L. Ed. 2d at 665 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). Given such instruction, the court finds the Supreme Court does not intend for its holdings in *Booker* to apply retroactively to cases on collateral review. *See Teague v. Lane*, 489 U.S. 288, 307, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (prohibiting the application of new rules of criminal procedure on collateral review, except where the new rule places certain kinds of conduct beyond the power of the government to proscribe or requires the observance of procedures that are "implicit in the concept of ordered liberty"). Accordingly, the defendant's claim which relies directly on *Blakely* or indirectly on *Booker* fails.[16]

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[16] The court notes the Eighth Circuit Court of Appeals has not addressed this issue. Nonetheless, a review of applicable case law indicates the consensus of circuit courts is that *Booker* does not apply retroactively on collateral review. *See, e.g., Cirilo-Munoz v. United States,* No. 02-1846, 2005 U.S. App. LEXIS 6343, at *16 (1st Cir. Apr. 15, 2005); *Guzman v. United States*, No. 03-2446, 2005 U.S. App. LEXIS 5700, at *4 (2d Cir. Apr. 8, 2005); *Varela v. United States*, 400 F.3d 864, 866-68 (11th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 860-63 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 480-81 (7th Cir. 2005). *Cf. In re Olopade*, No. 05-1617, 2005 U.S. App. LEXIS 5886, at *1 (3d Cir. Apr. 11, 2005) (denying permission to file a second or successive motion under 28 U.S.C. § 2255); *Bey v. United States*, 399 F.3d 1266, 1269 (10th Cir. 2005) (same); *Green v. United States*, 397 F.3d 101, 103 (2d Cir. 2005) (same); *In re Anderson*, 396 F.3d 1336, 1340 (11th Cir. 2005) (same).

Further, all of the defendant's claims either directly or indirectly relate to his sentencing, and he cannot base an ineffective assistance of counsel claim on his own pro se performance during that proceeding. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) ("[A] defendant who exercises his right to appear *pro se* cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." (internal quotation marks omitted)). *Cf. Hunter v. Bowersox*, 172 F.3d 1016, 1024 (8th Cir. 1999) ("All claims of ineffective assistance of counsel up through the entry of [defendant's] guilty plea are without merit because he voluntarily discharged counsel and pleaded guilty despite counsel's contrary advice."). And, to the extent he is asserting a claim for ineffective assistance by standby counsel, this claim fails because a defendant who elects to represent himself has no constitutional right to effective assistance of standby counsel. *McKaskle*, 465 U.S. at 183 ("A defendant does not have a constitutional right to choreograph special appearances by counsel.").

Finally, the court does not find that defendant is entitled to relief based on *Strickland*. The defendant has neither overcome the strong presumption that the conduct of trial counsel or appellate counsel fell within a wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, nor shown that any deficiencies in trial counsel or appellate counsel's performance prejudiced his defense, *id.* at 692-94.

In sum, all three motions are procedurally barred and the claims asserted in them are wholly without merit. Accordingly, the defendant's first motion to amend, second motion to amend and third motion to amend shall be denied.

E. Certificate of Appealability

In a 28 U.S.C. § 2255 proceeding before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding

is held. *See* 28 U.S.C. § 2253(a). Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. *See* 28 U.S.C. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if a defendant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedeman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)). *See also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [defendant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, "the [defendant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack*, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, the court finds the defendant failed to make the requisite "substantial showing" with respect to all of the claims he raised in his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because he does not present questions of substance for appellate review, there is no reason to grant a certificate of appealability. Accordingly, a certificate of appealability shall be denied. If he desires further review of his 28 U.S.C. § 2255 motion, the defendant may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520-22.

IV. CONCLUSION

For the foregoing reasons, the defendant's motion pursuant to 28 U.S.C. § 2255, first motion to amend, second motion to amend and third motion to amend shall be denied. With respect to his motion for an evidentiary hearing, the record is clear and an evidentiary hearing would not change the court's conclusions. Accordingly, the defendant's motion for an evidentiary hearing shall be denied. For similar reasons, the defendant's objection to Chief Magistrate Judge John A. Jarvey's order denying his request for discovery materials shall be denied. Finally, a certificate of appealability shall be denied.

IT IS THEREFORE ORDERED:

1) The defendant's motion to vacate, set aside or correct his sentence (Docket No. 195) is denied.

2) The defendant's first motion to amend (Docket No. 200) is denied.

3) The defendant's objection (Docket No. 211) is overruled.

4) The defendant's second motion to amend (Docket No. 215) is denied.

5) The defendant's third motion to amend (Docket No. 217) is denied.

6) The defendant's motion for an evidentiary hearing (Docket No. 222) is denied.

7) A certificate of appealability is denied.

DATED this 28th day of April, 2005.

LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA